

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 20, 2007 Session

**MARGARET DAVIS, Administrator of the Estate of Tammy Ferry, v.
BRETTANY M. MIRTH**

**Direct Appeal from the Circuit Court for Hamilton County
No. 06 C 358 Hon. L. Marie Williams, Circuit Judge**

No. E2006-01722-COA-R3-CV - FILED APRIL 19, 2007

Plaintiff's deceased filed suit for damages against defendant in General Sessions Court, which suit was ultimately non-suited, and the action re-brought in Circuit Court. The Circuit Court dismissed that action on the basis that the plaintiff failed to comply with Tenn. Code Ann. § 16-15-710 in the Sessions Court action and Tenn. Code Ann. § 28-1-105, the savings statute, did not apply to the facts of this case. On appeal, we affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, J., and SHARON G. LEE, J., joined.

William G. McPheeters, Dayton, Tennessee, for appellant.

Donald W. Strickland, Chattanooga, Tennessee, for appellee.

OPINION

The plaintiff in this case is the Administrator of the Estate of Tammy Ferry, and brought this action against defendant in the Hamilton County Circuit Court on February 22, 2006. The Complaint alleges that the deceased was involved in an automobile accident with defendant on September 26, 2003, and that suit was subsequently filed in the General Sessions Court, but service could not be obtained, so the case was voluntarily non-suited. The Complaint alleged that defendant caused the accident in question, which damaged decedent's vehicle and caused injury to decedent. Hence, this action for compensatory damages.

Defendant, in her Answer, asserted that plaintiff's claims were barred by the statute of limitations, and attached the Summons from the General Sessions suit, which showed that the action was filed on September 22, 2004, that process was returned unserved on September 28, 2004, that process was reissued on November 17 and again returned unserved on November 19, 2004, and that the action was voluntarily non-suited without prejudice on August 25, 2005.

The Trial Court denied the Motion, but defendant filed a Motion to Alter or Amend or for Interlocutory Appeal, asserting that pursuant to Tenn. Code Ann. §16-15-710, in order to rely on the original commencement to toll the statute of limitations, plaintiff had to either obtain new process within nine months, or refile the action within one year, and since plaintiff had done neither, she could not rely on the General Sessions suit to toll the statute. The Trial Court then agreed, and dismissed plaintiff's Complaint.

Plaintiff has appealed, insisting the Complaint was not time-barred.

The parties agree that the following time line is correct:

9/26/03	automobile accident
9/22/04	suit filed in General Sessions, process issued
9/28/04	process returned unserved
11/17/04	process reissued
11/19/04	process returned unserved
8/25/05	voluntary non-suit taken
2/22/06	suit filed in Circuit Court

Plaintiff insists that her Complaint was timely and relies on the savings statute, Tenn. Code Ann. §28-1-105, which states:

(a) If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or the plaintiff's representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest. Actions originally commenced in general sessions court and subsequently recommenced pursuant to this section in circuit or chancery court shall not be subject to the monetary jurisdictional limit originally imposed in the general sessions court.

Plaintiff argues that the General Sessions suit was timely commenced, and was subsequently non-suited without prejudice, and that she could properly refile the action within one year and rely upon the Sessions Court's action to toll the statute of limitations.

Defendant counters that the plaintiff did not comply with the requirements of Tenn.

Code Ann. §16-15-710, which would entitle her to rely on the savings statute. The Code section states:

The suing out of a warrant is the commencement of a civil action, within the meaning of this title, whether it is served or not; but if the process is returned unserved, plaintiff, if plaintiff wishes to rely on the original commencement as a bar to the running of a statute of limitations, must either prosecute and continue the action by applying for and obtaining new process from time to time, each new process to be obtained within nine (9) months from return unserved of the previous one (1), or plaintiff must recommence the action within one (1) year after the return of the initial process not served.

Defendant argues that since plaintiff failed to either have process reissued within nine months after the previous process was returned unserved, or to recommence the action within one year after the return of the initial process not served, plaintiff cannot rely on the original commencement of the action to toll the running of a statute of limitations, pursuant to the plain language of the statute.

A plaintiff who wishes to rely on the original commencement of an action to toll the running of the statute of limitations must either have process reissued within nine months after the previous process was returned unserved, which in this case would have been August 19, 2005, or must recommence the action within one year after the return of the initial process not served, which in this case would have been September 28, 2005. Plaintiff did not comply with either deadline. She insists, however, that taking a voluntary non-suit is somehow equivalent to recommencing the action, and that the savings statute should thereafter control.

The cases construing Tenn. Code Ann. §16-15-710 are *Dieudonne v. Metropolitan Gov't of Nashville*, 2006 WL 842915 (Tenn. Ct. App. Mar. 30, 2006) and *Carlton v. Davis*, 2003 WL 1923825 (Tenn. Ct. App. Apr. 24, 2003), and neither deals with the precise factual situation herein. These cases are clear in their holdings, however, that a plaintiff who fails to comply with the requirements of Tenn. Code Ann. §16-15-710 is subject to having his/her case dismissed pursuant to the statute of limitations bar. We find no cases addressing the question of whether the savings statute would apply to toll the statute of limitations after the taking of a voluntary non-suit in General Sessions Court, where the plaintiff failed to comply with Tenn. Code Ann. §16-15-710. The question has been addressed by courts regarding the similar provisions contained in Tenn. R. Civ. P. 3. Tenn. R. Civ. P. 3 provides:

All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within

one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint.

We have held that where a plaintiff fails to comply with the requirements of Tenn. R. Civ. P. 3, but rather takes a voluntary non-suit and refiles the action, the savings statute found at Tenn. Code Ann. §28-1-105 does not apply, and the plaintiff cannot rely on the original commencement to toll the statute of limitations. *See Gregory v. McCulley*, 912 S.W.2d 175 (Tenn. Ct. App. 1995); *Little v. Franceschini*, 688 S.W.2d 91 (Tenn. Ct. App. 1985); *Frye v. Blue Ridge Neuroscience Center, P.C.*, 2001 WL 242587 (Tenn. Ct. App. Mar. 12, 2001).

Frye was decided after Tenn. R. Civ. P. 3 was amended,¹ but this Court held that a plaintiff who failed to have process reissued could not simply take a non-suit and refile the action, relying upon the savings statute to toll the statute of limitations. *Frye*, 2001 WL 242587 (Tenn. Ct. App. Mar. 12, 2001). We stated that “once the one-year time limit in which to reissue process expired, plaintiff’s lawsuit was essentially dead.” *Id.* We explained that the plaintiff “cannot circumvent his failure to comply with Rule 3 by filing a new lawsuit and then seeking the benefit of the liberal construction of the saving statute.” *Id.*

In this case, plaintiff failed to comply with Tenn. Code Ann. §16-15-710 by either having process reissued within nine months or recommencing the action within one year, and since neither occurred, plaintiff could not rely on the original filing of the action to toll the statute of limitations. Thus, plaintiff’s Circuit Court action cannot be deemed to have been “commenced within the time limited by a rule or statute of limitation”, and the savings statute is inapplicable.

We affirm the Judgment of the Trial Court and remand, with the cost of the appeal assessed to the Estate of Tammy Ferry.

HERSCHEL PICKENS FRANKS, P.J.

¹ The prior version of Tenn. R. Civ. P. 3 allowed a plaintiff to either have process reissued within six months of the previous process, or to recommence the action within one year of the initial process.